Leftenan Kolonel Hafiz bin Hj Sulaiman & Ors v Zulkefli bin Mohamed

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-01(A)-43–01 OF 2022
VAZEER ALAM, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
27 JULY 2023

Armed Forces — Misconduct — Disobedience to standing order under Armed Forces Act 1972 — Serviceman was summarily charged, found guilty and fined by his commanding officer ('CO') for having methamphetamine in his urine when tested by Chemistry Department — CO failed to call chemist to testify at summary trial ('ST') of serviceman even though latter had requested CO to call the chemist — Whether High Court rightly set aside CO's decision to 'convict' and fine serviceman as non-calling of chemist rendered the ST procedurally improper — Whether High Court erred in setting aside Army Chief's decision under reg 61(1)(m) of Armed Forces (Terms of Service of Regular Forces) Regulations 2013 to discharge serviceman from Army on ground his services were no longer required — Whether Army Chief was lawfully entitled to order the discharge at any time without assigning any reason or giving serviceman an opportunity to be heard — Whether courts would not interfere in Army Chief's decision as it concerned matters of national security and administration of the Armed Forces

The respondent, who was a sergeant in the Malaysian Army, was fined a sum equivalent to 14 days' wages by his commanding officer ('the first appellant, 'A1') for having methamphetamine in his urine — an act which breached a standing order ('SO') under s 51 of the Armed Forces Act 1972 ('the AFA'). The methamphetamine was detected when a chemist at the Chemistry Department tested the respondent's urine sample after it was taken from him at the army camp. A1 conducted a summary trial ('ST') with regard to the respondent's breach of the SO and called seven witnesses to testify but not the chemist who analysed the urine sample even though the respondent had specifically requested A1 to call her to testify. The respondent's defence to the charge was that had never taken prohibited drugs. Based on all the evidence, A1 decided that the respondent was guilty of the charge and imposed the fine ('A1's decision'). About 1 1/2 months later, the second respondent ('A2'), who was the Chief of Army cum 'competent authority' appointed by the Armed Forces Council under s 2 of the AFA, notified the respondent that he was discharged from service in the Armed Forces under reg 61(1)(m) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 ('AFTSR') on the ground that his services were no longer required ('A2's decision'). The High Court quashed both A1's and A2's decisions in a judicial review application

('JRA') filed by the respondent and ordered that the respondent be re-tried by a court-martial. In the JRA, the respondent did not attack A2's decision at all but only A1's decision which, he said, was illegal, irrational, procedurally improper and in excess of jurisdiction. This was because A1's refusal to call the chemist to testify had deprived him of the opportunity to challenge her test and cross-examine her on her evidence. The respondent submitted that without the chemist's evidence it could not be said that the charge against him had been proven conclusively. In the instant appeal against the High Court's decision, the appellants argued, inter alia, that: (a) since a fine was imposed on the respondent, s 97(9) of the AFA did not require the respondent to be accorded the right to elect to be tried by court-martial; (b) A1 was served with the chemist's report well in advance of the ST and he did not object when the report was tendered in evidence; and (c) A2's decision should not have been set aside because it was independent of, and had no nexus to, A1's decision. A2 was entitled under the law to discharge the respondent at any time pursuant to reg 61(1)(m) of the AFTSR and such decision should not be questioned by the courts. The respondent, in reply, submitted, inter alia, that: (i) A1's decision was invalid because A1 did not allow the respondent to exercise his right to elect to be court-martialled; (ii) A1's failure to call the chemist rendered the ST procedurally irregular; (iii) the respondent's urine sample was contaminated when there was a preliminary testing of the sample in the camp even before it was sent to the Chemistry Department; and (iv) the appellants' actions had violated the respondent's constitutional right to livelihood under arts 5(1) and 8(1) of the Federal Constitution.

Held, unanimously affirming the High Court's quashing of A1's decision but setting aside the quashing of A2's decision as well as the order that the respondent be re-tried by court-martial:

(1) A1 did not breach s 97(9) of the AFA by not affording the respondent a right to elect to be tried by court-martial. Since the respondent was punished with a fine, s 97(9) of the AFA did not require A1 to have given the respondent the opportunity of electing to be tried by court-martial. As such, there was no basis for the High Court to order that the respondent be court-martialled. Such an order was also an exercise in futility as the respondent had been lawfully discharged from the Army by virtue of A2's decision (see paras 19 & 39–40).

(2) The court could not accept the respondent's contention that two urine samples should have been taken from him. Although under the Health Ministry guideline, two samples were required, the army guideline provided for only one sample. This court relied upon the Court of Appeal's decision in *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433 which held that the army guideline, unlike the Health Ministry guideline, had the force of law as it was made under s 15 of the AFA read together with art 137 of the Federal

Constitution. The guideline was issued by the Armed Forces Council pursuant to a power given by law. The Health Ministry guideline, on the other hand, was merely an administrative guideline that had no force of law. In any event, the army guideline was specifically meant for members of the armed forces, and could not be superseded by the Health Ministry guideline (see para 20).

(3) The appellants could not rely upon the proviso to s 399(1) of the Criminal Procedure Code ('the CPC') to justify A1's refusal to call the chemist at the summary trial of the respondent because the CPC had no application in this case. The charge against the respondent was for disobedience to a relevant SO. The charge was not a criminal offence under the Penal Code, the AFA or any other law (see para 22).

(4) A1's decision was procedurally improper due to A1's failure to call the chemist to testify at the summary trial. The chemist's testimony was crucial in proving the charge against the respondent beyond all reasonable doubt and the failure to call the chemist had deprived the respondent of the opportunity of cross-examining her and in presenting his defence. The High Court rightly quashed A1's decision as the procedural impropriety had caused an injustice to the respondent by adversely affecting his constitutional right to livelihood (see paras 28 & 31).

(5) The respondent could only be found guilty of the charge beyond all reasonable doubt if A1 had called the chemist to testify at the summary trial. The appellants could not get around the failure to call the chemist by submitting that the respondent had not objected when the chemist report was tendered in evidence at the trial or that he could have called the chemist on his own to testify at the trial or that he had not cross-examined the other witnesses that were called by A1 (see para 32).

(6) A discharge of a serviceman under reg 61(1)(m) of the AFTSR on the ground that his services were no longer required did not breach a serviceman's constitutional right to livelihood under arts 5(1) and 8(1) of the Federal Constitution because that constitutional right could be lawfully taken away under reg 61(1)(m) of the AFTSR. Regulation 61(3) of the AFTSR provided that a serviceman discharged from service under reg 61 was entitled to his/her pension, gratuity and all other benefits. In discharging the serviceman under reg 61(1)(m) AFTSR, the competent authority was not required to give the serviceman a right of hearing or a reason for the discharge and could exercise its discretion to discharge a serviceman from service at any time. If the court were to set aside A2's decision, it would be contrary to the literal interpretation and purposive construction of reg 61(1)(m) and render that provision redundant. In matters concerning the administration of the Armed Forces and national security, including the discharge of a serviceman from service, the courts

would defer to the competent authority's exercise of subjective discretion under reg 61(1)(m) of the AFTSR (see para 34).

(7) A2's decision was unaffected by the High Court's quashing of A1's decision on the ground of procedural impropriety. The High Court erred in quashing A2's decision without considering the literal interpretation and purposive construction of reg 61(1)(m) of the AFTSR, more so when the respondent himself had not given any grounds in his judicial review application for impugning A2's decision (see paras 35–37).

[Bahasa Malaysia summary

Responden, yang merupakan seorang sarjan dalam Tentera Malaysia, didenda dengan jumlah bersamaan dengan 14 hari gaji oleh pegawai pemerintah beliau ('perayu pertama, 'A1') kerana terdapat methamphetamine dalam air kencingnya — satu perbuatan yang melanggar perintah tetap ('PT') di bawah s 51 Akta Angkatan Tentera 1972 ('AAT'). Methamphetamine tersebut dikesan apabila seorang ahli kimia di Jabatan Kimia menguji sampel air kencing responden selepas ia diambil daripadanya di kem tentera. A1 menjalankan perbicaraan ringkas ('PR') berkenaan dengan pelanggaran PT oleh responden dan memanggil tujuh saksi untuk memberi keterangan tetapi bukan ahli kimia yang menganalisa sampel air kencing walaupun responden secara khusus meminta A1 memanggilnya untuk memberi keterangan. Pembelaan responden terhadap pertuduhan tersebut adalah bahawa tidak pernah mengambil dadah terlarang. Berdasarkan semua keterangan, A1 memutuskan bahawa responden bersalah atas pertuduhan dan mengenakan denda ('keputusan A1'). Kira-kira 1 1/2 bulan kemudian, responden kedua ('A2'), yang merupakan Panglima Angkatan Tentera merangkap 'competent authority' yang dilantik oleh Majlis Angkatan Tentera di bawah s 2 AAT, memaklumkan responden bahawa beliau telah diberhentikan daripada perkhidmatan dalam Angkatan Tentera di bawah peraturan 61(1)(m) Peraturan-Peraturan Angkatan Tentera (Terma-Terma Perkhidmatan Bagi Angkatan Tetap) 2013 ('PATTA') atas alasan bahawa perkhidmatannya tidak lagi diperlukan ('keputusan A2'). Mahkamah Tinggi membatalkan kedua-dua keputusan A1 dan A2 dalam permohonan semakan kehakiman ('PSK') yang difailkan oleh responden dan memerintahkan supaya responden dibicarakan semula oleh mahkamah tentera. Dalam PSK, responden sama sekali tidak membantah keputusan A2 tetapi hanya keputusan A1 yang, katanya, adalah menyalahi undang-undang, tidak rasional, tidak wajar dari segi prosedur dan melebihi bidang kuasa. Ini kerana keengganan A1 untuk memanggil ahli kimia untuk memberi keterangan telah menghalang peluangnya untuk mencabar ujiannya dan memeriksa balasnya mengenai keterangannya. Responden berhujah bahawa tanpa keterangan ahli kimia tersebut ia tidak boleh dikatakan bahawa pertuduhan terhadapnya telah dibuktikan secara muktamad. Dalam rayuan semasa terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah, antara lain, bahawa: (a) memandangkan denda dikenakan ke atas

responden, s 97(9) AAT tidak memerlukan responden diberi hak untuk memilih untuk dibicarakan oleh mahkamah tentera; (b) A1 telah disampaikan dengan laporan ahli kimia lebih awal daripada PR dan beliau tidak membantah apabila laporan tersebut ditandakan sebagai keterangan; dan (c) keputusan A2 tidak seharusnya diketepikan kerana ia adalah bebas daripada, dan tidak mempunyai hubungan dengan, keputusan A1. A2 berhak di bawah undang-undang untuk melepaskan responden pada bila-bila masa menurut peraturan 61(1)(m) PATTA dan keputusan sedemikian tidak boleh dipersoalkan oleh mahkamah. Responden, dalam menjawab, menghujahkan, antara lain, bahawa: (i) keputusan A1 adalah tidak sah kerana A1 tidak membenarkan responden menjalankan haknya untuk memilih untuk dibicarakan di mahkamah tentera; (ii) kegagalan A1 untuk memanggil ahli kimia menyebabkan PR menjadi ketidakaturan prosedur; (iii) sampel air kencing responden telah tercemar apabila terdapat ujian awal sampel di kem sebelum ianya dihantar ke Jabatan Kimia; dan (iv) tindakan perayu telah melanggar hak perlembagaan responden untuk menyara kehidupan di bawah perkara 5(1) dan 8(1) Perlembagaan Persekutuan.

Diputuskan, sebulat suara mengesahkan keputusan Mahkamah Tinggi membatalkan keputusan A1 tetapi mengenepikan pembatalan keputusan A2 serta perintah supaya responden dibicarakan semula oleh mahkamah tentera:

(1) A1 tidak melanggar s 97(9) AAT dengan tidak memberikan responden hak untuk memilih untuk dibicarakan oleh mahkamah tentera. Memandangkan responden telah dihukum dengan denda, s 97(9) AAT tidak memerlukan A1 memberi peluang kepada responden untuk memilih untuk dibicarakan oleh mahkamah tentera. Oleh itu, tiada asas bagi Mahkamah Tinggi untuk memerintahkan supaya responden dikenakan tindakan mahkamah tentera. Perintah sedemikian juga adalah sia-sia kerana responden telah diberhentikan secara sah daripada Tentera berdasarkan keputusan A2 (lihat perenggan 19 & 39–40).

(2) Mahkamah tidak dapat menerima dakwaan responden bahawa dua sampel air kencing sepatutnya diambil daripadanya. Walaupun di bawah garis panduan Kementerian Kesihatan, dua sampel diperlukan, garis panduan tentera hanya memerlukan satu sampel. Mahkamah ini bergantung kepada keputusan Mahkamah Rayuan dalam *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433 yang memutuskan bahawa garis panduan tentera, tidak seperti garis panduan Kementerian Kesihatan, mempunyai kuasa undang-undang seperti yang dibuat di bawah s 15 AAT dibaca bersama dengan perkara 137 Perlembagaan Persekutuan. Garis panduan tersebut dikeluarkan oleh Majlis Angkatan Tentera menurut kuasa yang diberikan oleh undang-undang. Garis panduan Kementerian Kesihatan, sebaliknya, hanyalah garis panduan pentadbiran yang tidak mempunyai kuasa undang-undang. Walau apa pun, garis panduan tentera secara

khusus ditujukan untuk anggota angkatan tentera, dan tidak boleh digantikan oleh garis panduan Kementerian Kesihatan (lihat perenggan 20).

(3) Perayu-perayu tidak boleh bergantung kepada proviso kepada s 399(1) Kanun Tatacara Jenayah ('KTJ') untuk mewajarkan keengganan A1 untuk memanggil ahli kimia pada perbicaraan ringkas responden kerana KTJ tidak terpakai dalam kes ini. Pertuduhan terhadap responden adalah kerana ingkar kepada PT yang berkaitan. Pertuduhan tesebut bukanlah satu kesalahan jenayah di bawah Kanun Keseksaan, AAT atau mana-mana undang-undang lain (lihat perenggan 22).

(4) Keputusan A1 adalah tidak wajar dari segi prosedur kerana kegagalan A1 memanggil ahli kimia untuk memberi keterangan pada perbicaraan ringkas. Keterangan ahli kimia adalah penting dalam membuktikan pertuduhan terhadap responden di luar semua keraguan munasabah dan kegagalan untuk memanggil ahli kimia telah menghalang peluang responden untuk menyoal balasnya dan dalam mengemukakan pembelaannya. Mahkamah Tinggi telah dengan tepat membatalkan keputusan A1 kerana ketidakwajaran prosedur yang telah menyebabkan ketidakadilan kepada responden dengan menjejaskan hak perlembagaan untuk menyara hidupnya (lihat perenggan 28 & 31).

(5) Responden hanya boleh didapati bersalah atas pertuduhan melampaui semua keraguan munasabah jika A1 telah memanggil ahli kimia untuk memberi keterangan semasa perbicaraan ringkas. Perayu-perayu tidak dapat menafikan kegagalan untuk memanggil ahli kimia dengan berhujah bahawa responden tidak membuat bantahan apabila laporan ahli kimia ditandakan sebagai keterangan di perbicaraan atau bahawa beliau boleh memanggil ahli kimia sendiri untuk memberi keterangan di perbicaraan atau bahawa beliau tidak menyoal balas saksi lain yang dipanggil oleh A1 (lihat perenggan 32).

(6) Perberhentian pekhidmat di bawah peraturan 61(1)(m) PATTA atas alasan bahawa perkhidmatannya tidak lagi diperlukan tidak melanggar hak perlembagaan askar untuk sara hidup di bawah perkara 5(1) dan 8(1) Perlembagaan Persekutuan kerana hak perlembagaan tersebut boleh dilucutkan secara sah di bawah peraturan 61(1)(m) PATTA. Peraturan 61(3) PATTA memperuntukkan bahawa seorang pekhidmat yang diberhentikan daripada perkhidmatan di bawah peraturan 61 layak mendapat pencen, ganjaran dan semua faedah lain. Dalam memberhentikan pekhidmat di bawah peraturan 61(1)(m) PATTA, otoriti kompeten tidak perlu memberi pekhidmat hak mendengar atau alasan pemberhentian dan boleh menggunakan budi bicaranya untuk memberhentikan pekhidmat daripada perkhidmatan pada bila-bila masa. Jika mahkamah mengetepikan keputusan A2, ia akan bertentangan dengan tafsiran literal dan penggubalan bertujuan bagi

peraturan 61(1)(m) dan menjadikan peruntukan tersebut sia-sia. Dalam perkara yang berkaitan dengan pentadbiran Angkatan Tentera dan keselamatan negara, termasuk pemberhentian pekhidmat daripada perkhidmatan, mahkamah akan menyerah kepada pelaksanaan budi bicara subjektif pihak otoriti kompeten di bawah peraturan 61(1)(m) PATTA (lihat perenggan 34).

(7) Keputusan A2 tidak terjejas oleh keputusan Mahkamah Tinggi yang membatalkan keputusan A1 atas alasan ketidakwajaran prosedur. Mahkamah Tinggi telah terkhilaf dalam membatalkan keputusan A2 tanpa mengambil kira tafsiran literal dan penggubalan bertujuan peraturan 61(1)(m) PATTA, lebih-lebih lagi apabila responden sendiri tidak memberikan sebarang alasan dalam permohonan semakan kehakimannya untuk mempersoal keputusan A2 (lihat perenggan 35–37).]

Cases referred to

DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor [2019] 3 MLJ 671; [2019] 3 CLJ 593, CA (folld)
Hanson v Church Comrs for England, R v London Rent Assessment Committee, ex p Hanson [1978] QB 823, QB (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (refd)
Kolonel Dr Faiz Azraai bin Abdul Aziz v Mahkamah Tentera Divisyen Keempat Infantri Malaysia [2023] 4 MLJ 78, FC (refd)
Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri [2019] 2 MLJ 433, CA (folld)
Malayawata Steel Bhd v Union of Malayawata Steel Workers [1978] 1 MLJ 87 (refd)
Tufnell, In re (1876) 3 Ch D 164, Ch D (refd)
Wan Ramli bin Wan Seman v Lt Kol Sharull Hesham bin Md Yasin & Ors [2023] MLJU 1264, HC (refd)

Legislation referred to

Armed Forces (Summary Jurisdiction) Regulations 1976 regs 12, 13, 14(1), 16
Armed Forces (Terms of Service of Regular Forces) Regulations 2013 reg 61, 61(1)(m), 61(3)
Armed Forces Act 1972 ss 2, 15, 36, 51, 95, 96, 96(2), (4), (5), 97, 97(2)(a), (2)(b), (3)(a), (3)(b), (3)(c), (3)(d), (3)(e), (3)(f), (3)(g), (4), (3), (5), (6), (7), (8), (9), (11), Part V
Criminal Procedure Code ss 2(1), 5, 399, 399(1)
Federal Constitution arts 5(1), 8(1), 160(2)
Interpretation Acts 1948 and 1967 s 3(b)
Rules of Court 2012 O 53 rr 2(3), 3(2), 7(1)

A Rules of the Court of Appeal 1994 r 54

Appeal from: Judicial Review Application No CA-25–2–02 of 2021 (High Court, Kuantan)

B *Noor Fadzila bt Ishak (Senior Federal Counsel, Pahang State Legal Advisor's Office) for the appellants.*
Rejinder Singh (with Mohammed Nasser bin Yusof) (The Law Chambers of Fauzi & Nasser) for the respondent.

C **Wong Kian Kheong JCA:**

INTRODUCTION

[1] This appeal concerns the following parties:

D (1) the respondent ('respondent') was a sergeant of the Twelfth Battalion of the Royal Malay Regiment ('RMR') stationed in Daralockwood Camp, Kuantan, Pahang Darul Makmur ('camp') and a 'serviceman' of the Armed Forces as defined in s 2 of the Armed Forces Act 1972 ('the AFA');

E (2) the first appellant ('first appellant') was the respondent's 'commanding officer' (defined in s 2 of the AFA) ('commanding officer') at the Camp;

(3) the second appellant ('second appellant') is the Chief of Army who is the 'competent authority' ('competent authority') appointed by the Armed Forces Council ('third appellant') under s 2 of the AFA; and

F (4) the Ministry of Defence and Government of Malaysia are the fourth and fifth appellants ('fourth appellant' and 'fifth appellant') respectively.

In this judgment, we shall refer to the first to fifth appellants collectively as the 'appellants'.

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[2] This appeal raises the following novel questions:

(1) when a serviceman ('accused') is charged with disobedience to a 'standing order' ('standing order') made under s 51 of the AFA ('charge') and if the commanding officer decides to deal summarily with the charge ('summary trial'), during the conduct of the summary trial, when is the commanding officer required by s 97(9) of the AFA to accord to the accused the right to elect to be tried by court-martial? We use the description 'summary trial' as provided in reg 16 of the Armed Forces (Summary Jurisdiction) Regulations 1976 ('the AFSJR');

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(2) if the commanding officer conducts a summary trial:

(a) has the commanding officer committed a procedural impropriety by refusing to call the chemist (who has found the urine sample of the

accused to contain a substance which is prohibited by a SO) to give expert evidence and be cross-examined by the accused at the summary trial?

(b) if the commanding officer has committed a procedural impropriety as described in the above sub-para (a), whether such a procedural impropriety can be excused by any one of the following grounds:

(i) in accordance with the proviso to s 399(1) of the Criminal Procedure Code ('the CPC'), the chemist report has been previously served on the accused more than ten clear days before the commencement of the summary trial;

(ii) the accused has not objected to the admissibility of the chemist report at the summary trial;

(iii) the accused has not cross-examined all the witnesses called by the commanding officer at the summary trial; and

(iv) the accused can call the chemist to testify for the accused at the summary trial.

(3) if the commanding officer has committed a procedural impropriety with regard to the summary trial, whether the court can issue a certiorari order to quash:

(a) the finding of the commanding officer that the accused is guilty of the charge; and

(b) the punishment meted out by the commanding officer to the accused ('commanding officer's decision').

(4) with regard to a decision of the competent authority made under reg 61(1)(m) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 ('the AFTSR') to discharge the accused from service in the Armed Forces ('service') on the ground that the accused's service was no longer required ('competent authority's decision'):

(a) if the court has issued an order of certiorari to invalidate the commanding officer's decision, can the court also issue a certiorari order to quash the competent authority's decision as a corollary? and

(b) in view of the literal meaning and purpose of reg 61(1)(m) of the AFTSR, should the court decline to exercise its discretion under O 53 r 2(3) of the Rules of Court 2012 ('the RC') to:

(i) grant a certiorari order to set aside the competent authority's decision; and

(ii) give an order of mandamus to direct the accused to be re-tried by court-martial?

A BACKGROUND

[3] On 17 September 2020, the respondent was ordered to provide a urine sample ('sample') in the Camp so as to detect whether the sample contained any substance which was prohibited by a SO entitled 'Perintah Bahagian Pertama Batalion Kedua Belas, Regimen Askar Melayu DiRaja (Mekanize) Bil 21' dated 31 August 2020 ('relevant SO').

[4] The sample was sent to the Chemistry Department of Malaysia (CDM). At the CDM, the sample was analysed by Puan Manja Murni bt Che Khalid ('chemist') who gave a report dated 19 October 2020 ('chemist report'). According to the chemist report, the sample contained 'methamphetamine', a substance prohibited by the relevant SO.

[5] A letter dated 30 October 2020 was sent to the respondent which informed the respondent as follows, among others:

(1) the chemist report had been received by the Armed Forces; and

(2) the commanding officer would interview (*temuduga*) the respondent on 11 November 2020.

[6] On 9 November 2020, the chemist report was served on the respondent.

[7] The respondent served a letter dated 19 November 2020 on the first appellant which requested for the chemist to give evidence at the summary trial ('respondent's request').

[8] The summary trial was postponed to 27 November 2020. The following matters, among others, transpired at the summary trial:

(1) the first appellant read out the charge to the respondent, ie, the respondent was charged with disobedience to the relevant SO (the respondent had provided the sample which contained a prohibited substance);

(2) the respondent was asked by the first appellant on whether the respondent understood the charge to which the respondent replied that he understood the charge;

(3) the first appellant inquired from the respondent on whether the respondent had received the chemist report ten clear days before the commencement of the summary trial. The respondent answered in the affirmative;

(4) seven witnesses were called by the first appellant ('seven witnesses') to give evidence on the following matters, among others:

(a) the taking of the sample from the respondent in a specimen bottle ('bottle'); A

(b) the recording of the respondent's details on the bottle and the sealing of the bottle were done in the presence of the respondent;

(c) in the respondent's presence, the bottle was placed in a specimen bag which was secured with a security tag ('bag'); B

(d) the bag was handed to the chemist in CDM for analysis; and

(e) upon receipt of the chemist report from CDM, the chemist report was served on the respondent. C

(5) the respondent did not cross-examine the seven witnesses ('no cross-examination (seven witnesses)');

(6) the first appellant found that a prima facie case of the charge had been proven against the respondent. The first respondent explained to the respondent that the respondent had the following three options: D

(a) option to remain silent;

(b) option to give sworn evidence; and E

(c) option to give unsworn evidence.

(7) the respondent chose the option to give sworn evidence. According to the respondent, he had never taken drugs;

(8) the respondent did not call any other person to give evidence on his behalf; F

(9) the first appellant found that the charge had been proven against the respondent (first appellant's finding of guilt); and

(10) before the first appellant imposed punishment on the respondent: G

(a) the first appellant had allowed the respondent to make a plea in mitigation of the punishment which could be meted out by the first appellant to the respondent;

(b) the respondent was also permitted by the first appellant to call a character witness who gave evidence of the respondent's good character; and H

(c) the respondent's service record showed that throughout the respondent's service of 19 years and two months in RMR:

(i) the respondent had not been guilty of any disciplinary offence; and I

(ii) the respondent's work perfomance was good.

(11) the first appellant ordered the respondent to pay a fine which was equivalent to the respondent's wages for 14 days ('fine'). This judgment shall refer the first appellant's finding of guilt and fine collectively as the 'first appellant's decision'.

[9] By way of a letter dated 11 January 2021, the second appellant discharged the respondent from service under reg 61(1)(m) of the AFTSR on the ground that the respondent's service was no longer required ('second appellant's decision'). The title of the second appellant's decision stated as follows (in the National Language):

> *KELULUSAN PEMBERHENTIAN ATAS SEBAB TATATERTIB SALAH LAKU DAN SEBAB-SEBAB LAIN ANGGOTA LAIN-LAIN PANGKAT (LLP)* (Emphasis added.)

PROCEEDINGS IN THE HIGH COURT

[10] The respondent filed a judicial review application ('JRA') in the High Court and sought for the following relief, among others:

(1) a certiorari order to set aside:

(a) the first appellant's decision; and

(b) the second appellant's decision.

(2) an order of mandamus to direct the respondent to be re-tried by court-martial.

[11] As required by O 53 r 3(2) of the RC, the JRA was supported by a statement ('statement'). Paragraphs 9 and 10 of the statement have laid down the following grounds for the relief sought in the JRA:

(1) when the first appellant refused to call the chemist to give evidence at the summary trial:

(a) the first appellant had committed an error of law and/or an illegality;

(b) the first appellant had exceeded his jurisdiction and/or had committed an error regarding his jurisdiction;

(c) the first appellant had acted irrationally and/or had not considered relevant factors; and/or

(d) the first appellant had committed a procedural impropriety.

(2) the first appellant's decision was unreasonable in the *Wednesbury* context.

The statement did not provide any ground for the court to set aside the second appellant's decision.

[12] The learned High Court judge ('HCJ') granted ex parte leave for the JRA and at the substantive hearing of the JRA, the learned HCJ allowed the JRA as follows:

(1) an order of certiorari was issued to quash:

(a) the first appellant's decision; and

(b) the second appellant's decision.

(2) a mandamus order was granted for the respondent to be re-tried by court-martial; and

(3) no order of costs for the JRA ('High Court's decision').

[13] Paragraphs 17 to 19 of the learned HCJ's grounds of judgment ('GOJ') gave the following grounds for the High Court's decision:

(1) in view of the respondent's request, the first appellant should have called the chemist to give evidence at the summary trial;

(2) the chemist should be called by the first appellant to testify at the summary trial because it was important for the respondent to know what test and analysis of the sample had been conducted by the chemist. Consequently, the respondent had been irreparably prejudiced by the first respondent's failure to call the chemist to give evidence at the summary trial;

(3) no reason was given by the first appellant on why the chemist could not be called to give evidence at the summary trial;

(4) the first appellant had erred in deciding that there was proof of a prima facie case of the charge when the first appellant did not refer to the chemist report; and

(5) the first appellant's failure to call the chemist to testify at the summary trial had deprived the respondent of the respondent's right to cross-examine the chemist. Hence, there was procedural impropriety which invalidated the first appellant's decision and second appellant's decision.

[14] The appellants have appealed to this court against the entire High Court's decision.

A SUMMARY OF APPELLANTS' SUBMISSION

[15] In support of this appeal, the learned senior federal counsel ('SFC') has contended as follows, among others:

B (1) as the first appellant had only imposed the fine on the respondent, s 97(9) of the AFA did not require the first appellant to accord the respondent the right to elect to be tried by court-martial;

(2) the first appellant was not required to call the chemist to testify at the summary trial because:

C (a) the proviso to s 399(1) of the CPC had been fulfilled as the chemist report had been served on the respondent more than ten clear days before the commencement of the summary trial;

(b) the chemist report had been tendered as evidence at the summary trial without any objection by the respondent;

D (c) there was no cross-examination (seven witnesses) by the respondent; and

(d) the respondent could have called the chemist to testify in support of his defence at the summary trial but he chose not do so. Premised on the above reasons, there was no procedural impropriety in the conduct of the summary trial by the first appellant.

E (3) the second appellant's decision was lawfully made pursuant to reg 61(1)(m) of the AFTSR. In any event, there was no nexus between the first appellant's decision and second appellant's decision. This is because even if the first appellant's decision was quashed by a certiorari order, the second appellant was empowered under reg 61(1)(m) of the AFTSR to make the second appellant's decision.

F

G SUMMARY OF RESPONDENT'S CONTENTIONS

[16] The respondent's learned counsel has resisted this appeal on the following grounds, among others:

H (1) by virtue of s 97(9) of the AFA, the first appellant's finding of guilt was invalid because the first appellant did not allow the respondent to exercise his right to elect to be court-martialled;

(2) notwithstanding the respondent's request, the first appellant failed to call the chemist to give evidence at the summary trial. There was therefore procedural impropriety in the first appellant's conduct of the summary trial;

I (3) instead of one sample, two urine samples should be obtained from the respondent;

(4) the sample was contaminated when there was a preliminary testing of the sample in the camp (before the sample was sent to the chemist); and

(5) in view of the above reasons, the respondent's constitutional rights under arts 5(1) and 8(1) of the Federal Constitution ('the FC') had been violated. Hence, the learned HCJ did not err in making the High Court's decision.

OUR DECISION

Did first appellant breach s 97(9) of the AFA?

[17] Sections 51, 95, 96 and 97 of the AFA state as follows:

s 51 *Disobedience to standing orders*

(1) *Every person subject to service law under this Act who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him or which he might reasonably be expected to know, shall, on conviction by court martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.*

(2) *This section applies to standing orders* or other routine orders of a continuing nature *for any formation or unit or body of troops, or for any command or other area, establishment, garrison or place*, or for any ship, train or aircraft.

(3) The standing orders or other routine orders described in subsection (2) may be —

(a) made by; and

(b) published in such manner as may be determined by, the Service Chief for each Service or any officer authorized by him.

s 95 *Investigation of charges by commanding officers*

Before an allegation against a person subject to service law under this Act (hereinafter referred to as 'the accused') that he has committed an offence against any provision of this Part is further proceeded with, the allegation shall be reported, in the form of a charge, to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

s 96 *Charges to be dealt with summarily or by court martial*

(1) After investigation, a charge against a commissioned officer below the rank of lieutenant-colonel or its equivalent or against a warrant officer may, if an authority has power under the following provisions of this Part to deal with it summarily, be so dealt with by that authority in accordance with those provisions.

(2) *After investigation, a charge against* an appointed officer or against *a serviceman* or volunteer (when subject to service law under this Act) *below*

the rank of warrant officer may be dealt with summarily by his commanding officer, subject to and in accordance with the following provisions of this Part.

(3) *If, after investigation, any charge is not dealt with summarily as aforesaid, the accused shall be remanded for trial by court-martial*.

(4) *Notwithstanding anything in the foregoing provisions of this section, where* —

(a) the commanding officer has investigated a charge against a commissioned officer or a warrant officer; or

(b) *the commanding officer has investigated a charge* against an appointed officer or *against a serviceman* or volunteer (when subject to service law under this Act) *below the rank of warrant officer, which is not one which can be dealt with summarily*, *the commanding officer may dismiss the charge if he is of the opinion that it ought not to be further proceeded with*.

(5) *References in this Act to dealing summarily with the charge are references to the taking by the appropriate superior authority or the commanding officer of the accused, as the case may require, of the following action, that is to say, determining whether the accused is guilty, dismissing the charge or recording a finding of guilt accordingly and awarding punishment*.

s 97 *Further proceedings on charges against an appointed officer, servicemen and volunteers below the rank of warrant officer*

(1) *The following provisions of this section shall have effect where the commanding officer has investigated a charge* against an appointed officer or *against a serviceman* or volunteer (when subject to service law under this Act) *below the rank of warrant officer*.

(2) *If* —

(a) *the charge is not one which can be dealt with summarily and the commanding officer has not dismissed it; or*

(b) *the charge is one which can be dealt with summarily but the commanding officer is of the opinion that it should not be so dealt with, he shall take the prescribed steps with a view to the charge being tried by court-martial*.

(3) *In any other case, the commanding officer shall proceed to deal with the charge summarily; and if he records a finding of guilt he may, subject to subsection (4), award one or more of the following punishments, that is to say*:

(a) detention for a period not exceeding ninety days, or if the accused being a non-commissioned officer or private or its equivalent is on active service, field punishment not exceeding ninety days: Provided that —

(i) a punishment of detention or field punishment awarded by a commanding officer to a non-commissioned officer shall not be carried into effect until it has been approved by an approving authority and only to the extent so approved;

(ii) where a commanding officer awards more than twenty-eight days' detention or field punishment, the portion in excess of twenty-eight days shall be effective only if approved by, and to the extent approved by, an approving authority;

(b) reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, but, except as provided in subsections (5) and (6), a punishment of reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, imposed by a commanding officer shall be effective only if approved by, and to the extent approved by, an approving authority;

(c) *a fine*;

(d) if the accused is an appointed officer or non-commissioned officer, severe reprimand or reprimand;

(e) forfeiture of good conduct badges, but where such forfeiture will entail the forfeiture of a long service and good conduct medal, a punishment of forfeiture of good conduct badges shall be effective only if approved by an approving authority;

(f) where the offence has occasioned any expense, loss or damage, stoppages;

(g) any minor punishments for the time being authorized in regulations made under this Part: Provided that no fine or minor punishment shall be awarded for an offence for which detention is awarded, and that no fine shall be awarded for an offence for which field punishment is awarded.

(4) If the accused is an appointed officer the commanding officer shall not award any punishment other than those set out in paragraphs (c), (d), (f) and (g) of the last foregoing subsection.

(5) Where the accused is a lance corporal or lance bombardier, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to be reduced to the ranks.

(6) Where the accused is an acting warrant officer or acting non-commissioned officer, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to revert to his permanent rank or rate.

(7) Where a non-commissioned officer is awarded any period of detention or field punishment, he shall also be ordered to be reduced to the ranks or to be disrated to a grade lower than that of leading rating, as the case may be: Provided that, if the commanding officer fails to order him to be so

reduced, the sentence of the commanding officer shall not be invalid but shall be deemed to include a sentence of reduction to the ranks or of disrating to a grade lower than that of leading rating as the case may be.

(8) Where a commanding officer awards a fine as a punishment for drunkenness, the amount of the fine shall not exceed thirty ringgit.

(9) *Notwithstanding anything contained in subsection (3), where the commanding officer has determined that the accused is guilty and if the charge is dealt with summarily will award punishment other than severe reprimand, reprimand, fine or a minor punishment, or where a finding of guilt (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine), the commanding officer shall not record a finding until after affording the accused an opportunity of electing to be tried by court-martial; and if the accused so elects and does not subsequently, in accordance with regulations made under this Part withdraw his election, the commanding officer shall not record a finding of guilt but shall take the prescribed steps with a view to the charge being tried by court-martial.*

(10) *In this section 'approving authority' means any officer not below the rank of colonel or its equivalent designated by the Armed Forces Council as an approving authority for the purposes of this section.*

(11) *Where a charge is one that can be dealt with summarily, but the commanding officer has taken steps with a view to its being tried by court-martial, any higher authority to whom the charge is referred may refer the charge back to the commanding officer to be dealt with summarily; and on any such reference the commanding officer shall dispose of the charge as if he had originally been of the opinion that the charge should be dealt with summarily: Provided that a charge shall not be referred back where the accused has elected to be tried by court-martial and has not withdrawn his election.* (Emphasis added.)

[18] We are of the following view regarding a commanding officer's duties and discretionary powers with regard to a complaint that an accused has breached a SO pursuant to s 51 of the AFA:

(1) s 95 AFA mandatorily requires the accused's commanding officer to investigate the charge against the accused ('investigation');

(2) after the investigation:

(a) the commanding officer may dismiss the charge under s 96(4) of the AFA read with reg 14(1) of the AFSJR. We reproduce below reg 14(1) of the AFSJR:

reg 14 *Restrictions on power to dismiss a charge.*

(1) *A commanding officer shall not dismiss a charge unless he is satisfied —*

(a) *that the charge is groundless; or*

(b) *that there are special circumstances which justify its dismissal*. (Emphasis added.); or

(b) if the commanding officer does not dismiss the charge pursuant to s 96(4) of the AFA and reg 14(1) of the AFSJR:

(i) the commanding officer has a discretion to deal summarily with the charge if the charge is one which can be dealt with summarily by the commanding officer — please refer to ss 96(2), 97(2)(a), (b) and (3) of the AFA read with reg 12 of the AFSJR. Regulation 12 of the AFSJR states as follows:

> reg 12 *Charges with which a commanding officer* or appropriate superior authority *may deal summarily.*
>
> *A commanding officer* or an appropriate superior authority *may deal summarily with a charge under any of the following sections of [AFA]*: 44, 46(e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59(1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and 81(b), 86 (where the principal offence can be dealt with summarily by virtue of this Regulation); 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations). (Emphasis added.); or

(ii) the commanding officer shall take steps prescribed by AFA for the accused to be court-martialled in the following circumstances:

(iia) the charge is one which cannot be dealt with summarily by the commanding officer — please refer to s 97(2)(a) of the AFA; *or*

(iiib) the charge is one which can be dealt with summarily by the commanding officer but the commanding officer is of the opinion that the charge should not be dealt with summarily — please refer to s 97(2)(b) of the AFA ('s 97(2)(b) option');

(3) if a commanding officer exercises s 97(2)(b) option, ie, if a commanding officer takes steps for the court-martial of the accused, by reason of s 97(11) of the AFA, a higher authority than the commanding officer may refer the charge back to the commanding officer for the charge to be dealt with summarily by the commanding officer. Such a reference back to the commanding officer is not available when an accused has elected to be tried by court-martial under s 97(9) of the AFA — please refer to the proviso to s 97(11) of the AFA and sub-para (5) below;

(4) according to s 96(5) of the AFA, a commanding officer deals summarily with the charge by:

(a) dismissing the charge; or

(b) finding that the accused is guilty of the charge by recording such a finding of guilt and by awarding punishment of the accused as provided

A in s 97(3)(a)–(g) of the AFA (subject to the specific provisions in s 97(4), (5), (6), (7) and (8) of the AFA). In this regard, reg 13 of the AFSJR has provided that a commanding officer may award any of the punishments prescribed under, among others, s 97 of the AFA; and

B (5) when a commanding officer deals summarily with the charge and has determined that the accused is guilty and:

(a) if commanding officer *will* award the following punishment which is not a:

C (i) a severe reprimand;

(ii) a reprimand;

(iii) a fine; or

D (iv) a minor punishment, or

(b) where a finding of guilt (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine) the commanding officer shall not *record* a finding of guilt until the commanding officer has given the accused a right to elect to be tried by court-martial. If the accused elects

E to be court-martialled and does not subsequently withdraw his or her election in accordance with regulations made under Part V of the AFA, the commanding officer shall not record a finding of guilt but shall take steps prescribed by AFA for the court-martial of the accused.

F **[19]** We do not accept the respondent's contention that the first appellant had breached s 97(9) of the AFA by not affording the respondent a right to elect to be tried by court-martial. This is because the first appellant had only imposed the fine on the respondent. As explained in the above sub-para 18(5),

G s 97(9) of the AFA did not require the first appellant to give the respondent a right to elect to be court-martialled. Our research has shown that a similar decision was reached by Ahmad Kamal Md Shahid J in the High Court in *Wan Ramli bin Wan Seman v Lt Kol Sharull Hesham bin Md Yasin & Ors* [2023] MLJU 1264 at [18].

H *Whether taking of one sample from respondent was valid*

[20] We cannot accept the respondent's submission that two urine samples should have been obtained from the respondent. We rely on the Court of

I Appeal's judgment delivered by Abdul Rahman Sebli JCA (as he then was) in *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433, at [8]–[9], [11]–[12], [14]–[15], [18], [26]–[27] and [29]–[35], as follows:

[8] *The dispute that arose was over how many bottles of urine sample was required to be*

taken for the purposes of a urine test. Under the army guideline, only one bottle is required whereas under the KKM (Kementerian Kesihatan Malaysia) guideline, two bottles are required.

[9] *In the case of the respondent, only one bottle of his urine sample was taken, which tested positive for the drugs methamphetamine and amphetamine. It was this test result that formed the basis for the charge against him. It was therefore important for the court to determine if the procedure adopted by the appellant in collecting urine samples for the purposes of urine tests was in accordance with the law.*

...

[11] *The question before us was simply this — which guideline applies, the army guideline or the KKM guideline?* The learned judge ruled that it is the KKM guideline that applies and not the army guideline. *The KKM guideline, inter alia, provides for the following procedure in the collection of urine samples*:

...

[12] *Learned counsel for the respondent contended that this guideline requires two bottles of urine sample to be taken. We read it differently. Our reading of para (c)(i) is that only one bottle of urine specimen is required, but a 'duplicate' ie a second bottle is required if the screening and confirmation are done in two different places. What is important is for the single bottle to contain at least 30ml of urine sample.*

...

[14] For a comparison of the KKM guideline with the army guideline, we reproduce below the relevant parts of the army guideline: ...

[15] *As is the case with the KKM guideline, the army guideline requires only one bottle of urine specimen to be taken. And like the KKM guideline, the army guideline also requires each bottle to contain at least 30ml of urine specimen. So basically the requirements of both guidelines are the same.*

...

[18] *But that is not the end of the matter. The question is not whether one or two bottles should be taken, but whether the procedure to be followed by the appellant is the KKM guideline or the army guideline. If it is the KKM guideline that must be followed, two bottles must be taken (since the screening and confirmation were done in two different places) but if the army guideline applies, only one bottle is required.*

...

[26] *What then is the status of the army guideline? Does it have any force of law? In our view it does. The first thing to note is that it was made under s 15 (AFA) read together with art 137 of the Federal Constitution ('the Constitution').*

[27] *The army guideline*, which can be found at pp 70-80 of the appeal record is dated 14 May 2009 and *was signed by the Secretary of the Armed Forces Council. He signed it 'Dengan Perintah Majlis Angkatan Tentera'. There can be no doubt therefore that the army guideline is a guideline that was issued pursuant to a power given by law.*

...

A [29] *Thus, by virtue of s 15 (AFA), the Armed Forces Council is empowered by law to make regulations it may think necessary or expedient for the better carrying into effect of the AFA, and this includes issuing the army guideline, which was issued by way of the 'Perintah Majlis Angkatan Tentera'. Being made by authority of the Armed Forces Council, the army guideline is therefore valid and enforceable.*

B [30] *What about the KKM guideline, does it have any force of law? With regret and with the greatest of respect to the panel of this court that decided Noor Shariful Rizal, we are unable to agree that the KKM guideline has the force of law. In the first place, unlike the army guideline, it was not made under any written law.*

C [31] *The KKM guideline was merely a guideline issued by the Ministry of Health through a circular dated 3 September 2002 and signed by the Director General of the Ministry of Health. The fact that the KKM guideline makes references to the Dangerous Drugs Act 1952 as observed by this court in Noor Shariful Rizal does not clothe it with the force of law.*

D [32] *Paragraphs 1 and 2 of the circular fortifies our view that it is merely an administrative guideline with no force of law.*

...

[33] *It is patently clear that the purpose of the KKM guideline is to coordinate and update the procedure for the taking of urine samples in suspected drug abuse cases and as* E *a guideline to the relevant agencies, including the armed forces. It was not meant to be a legal document having the force of law. For any guideline to have any force of law, it must be made pursuant to a power given by law. This is not the case with the KKM guideline.*

F [34] *Since the procedure adopted by the appellant in taking only one bottle of the respondent's urine specimen for his urine test was in accordance with the army guideline, the question that the appellant had breached the KKM guideline by not taking two bottles of his urine sample does not arise, and this is so even if the KKM guideline has the force of law, and assuming we are wrong in holding the view that it has no force of law.*

G [35] *In any event, even if the KKM guideline has the force of law, it cannot supersede the army guideline. This is because the army guideline is a specific guideline which is meant to be enforced by the armed forces only and by no others and it is enforceable against all members of the armed forces without any exception.* (Emphasis added.)

Does s 399(1) of the CPC apply to summary trial under AFA?

H

[21] Sections 5 and 399 of the CPC provide as follows:

s 3 *Trial of offences under Penal Code and other laws*

All offences under the Penal Code shall be inquired into and tried according to the I *provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions: subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences*

s 399 *Reports of certain persons*

(1) *Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him* or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report *may be given in evidence in any inquiry, trial or other proceeding under this Code* unless that person or Registrar shall be required to attend as a witness —

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

(2) *The following are persons to whom the provisions of this section apply*:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) *chemists in the employment of any Government in Malaysia* or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

(3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands. (Emphasis added.)

[22] We are of the view that the learned SFC's reliance on the proviso to s 399(1) of the CPC to justify the first appellant's refusal to call the chemist at the summary trial is misplaced. Our reasons are as follows:

(1) s 3 of the CPC has expressly provided that all 'offences under the Penal Code' ('the PC') and 'offences under any other law' 'shall be inquired into and tried' according to the CPC, including s 399 of the CPC. The charge in this case concerned disobedience to the relevant SO and did not involve a criminal offence under PC, AFA or any other law. Accordingly, all provisions in CPC, including s 399 of theCPC, cannot apply in this case. At this juncture, we should clarify that although reg 16 of the AFSJR uses the description '*summary trial*', a summary trial

conducted by a commanding officer is different from a summary trial conducted by a 'court' (defined in s 2(1) of the CPC as the High Court, sessions court or magistrate's court);

(2) s 399(1) of the CPC has stated that a chemist report 'may be given in evidence in any inquiry, trial or other proceeding' under CPC, (not under AFA and AFSJR); and

(3) the proviso to s 399(1) of the CPC only enables the public prosecutor ('PP') (not the commanding officer) to tender a chemist report in a criminal trial if the PP has served the chemist report on an accused person not less than ten clear days before the commencement of the criminal trial. As such, a commanding officer cannot rely on the proviso to s 399(1) of the CPC.

Whether court may review commanding officer's decision after summary trial (commanding officer's decision (summary trial))

[23] Firstly, by virtue of arts 5(1) and 8(1) of the FC, a serviceman has a constitutional right to livelihood in respect of his or her service in the Armed Forces (constitutional right to livelihood) — please refer to the Federal Court's judgment delivered by Mary Lim FCJ in *Kolonel Dr Faiz Azraai bin Abdul Aziz v Mahkamah Tentera Divisyen Keempat Infantri Malaysia* [2023] 4 MLJ 78, at [26].

[24] Secondly, as decided in *Kolonel Dr Faiz Azraai*, at [19], the court may review a court-martial decision.

[25] Thirdly, we are of the considered view that a commanding officer's decision (summary trial) is amenable to judicial review. This view is supported by the following reasons:

(1) there is no policy reason to exclude judicial review of a commanding officer's decision (summary trial);

(2) if the court can review a court-martial decision (please refer to *Kolonel Dr Faiz Azraai*), there is nothing in principle to exclude the court's review of a commanding officer's decision (summary trial);

(3) if there is no judicial review of a commanding officer's decision (summary trial) there will be an injustice to the serviceman who is found guilty and punished notwithstanding that there may exist any one or more of the following three grounds for judicial review ('three grounds (judicial review)'):

(a) the commanding officer has committed an illegality or error of law with regard to the summary trial;

(b) there is procedural impropriety, procedural unfairness or breach of the rules of natural justice in respect of the conduct of the summary trial; and/or

(c) the commanding officer's decision (summary trial) is 'irrational' as understood in case law. When there is presence of any one or more of the three grounds (judicial review) and if the court has no jurisdiction to review a commanding officer's decision (summary trial) which is adverse to a serviceman, the serviceman's constitutional right to livelihood is rendered illusory; and

(4) this court takes judicial notice that our military personnel answer the calling to serve our country selflessly as a matter of personal honour. To quote William Shakespeare in 'Richard II', Act 1, Scene 1:

> Mine honour is my life; both grow in one. Take honour from me, and my life is done.

If a commanding officer's decision (summary trial) has a negative impact on a serviceman's professional reputation, the court should have the jurisdiction to review the commanding officer's decision (summary trial) so as to vindicate the serviceman's personal honour.

Was there procedural impropriety in summary trial?

[26] We now discuss the novel question of whether the first appellant had committed a procedural impropriety by refusing to call the chemist to give expert evidence and be cross-examined by the respondent at the summary trial.

[27] In the High Court case of *Malayawata Steel Bhd v Union of Malayawata Steel Workers* [1978] 1 MLJ 87 at p 88, Gunn Chit Tuan J (as he then was) has decided as follows:

> *In reaching a decision in relation to a trade dispute referred to an Industrial Court under s 30 of the Industrial Relations Act 1967 (Revised 1976), the hearing before it should be in accordance with the rules of natural justice. Thus in his judgment in Russell v Duke of Norfolk* [1949] 1 All ER 109 *at p 118, Lord Justice Tucker has said as follows*:
>
> > *There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural*

A *justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.*

In this case, I took the view that there had been a denial of natural justice in that the applicant was not allowed to call witnesses and was therefore not given a reasonable B *opportunity of presenting its case. Since there had been a denial of natural justice, the High Court was in a position to interfere and to make an order of certiorari.* (Emphasis added.)

C **[28]** We have no hesitation to uphold part of the High Court's decision that the first appellant's decision had been made due to procedural impropriety, namely, the respondent had been deprived of a reasonable opportunity of presenting the respondent's defence at the summary trial when the first appellant failed to call the chemist to give expert evidence and be cross-examined by the respondent at the summary trial ('first appellant's D procedural impropriety'). This decision is premised on the following evidence and reasons:

(1) it could not be denied that the gravamen of the charge depended solely on the expert evidence of the chemist. In other words, the chemist's E expert testimony was crucial to prove the charge against the respondent beyond all reasonable doubt;

(2) the respondent's request had been sent to the first appellant. There was no evidence that the chemist was not available to testify at the summary trial;

F

(3) before the commencement of the summary trial, the first appellant did not inform the respondent that the first appellant would not accede to the respondent's request. Hence, the respondent was not able to make any arrangement to call the chemist to give an expert opinion at the G summary trial; and

(4) the summary trial had been postponed once. There was no reason why the summary trial could not be postponed a second time so as to enable the first appellant to call the chemist to give expert evidence at the summary trial. In this regard, we rely on the following judgment of H Roskill LJ (as he then was) in United Kingdom's (UK) Court of Appeal case of *Hanson v Church Comrs for England, R v London Rent Assessment Committee, ex p Hanson* [1978] QB 823 at p 838:

I *I am very conscious of the irritation as well as the extra expense which last minute adjournments can cause, particularly with tribunals of this nature, and I recognise the desire of any tribunal to avoid such adjournments wherever possible. But sometimes, if justice is to be done, adjournments are essential.* (Emphasis added.)

Court's discretion to grant relief in JRA

[29] Order 53 r 2(3) of the RC provides as follows:

> *Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may* dismiss the application or *make any orders*, including an order of injunction or monetary compensation: Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950. (Emphasis added.)

[30] As provided by the words 'may … make any orders' in O 53 r 2(3) of the RC, if there exists any one of the three grounds (JR), the court has a discretion to grant or refuse relief in a JRA. In the Federal Court case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at pp 393–394, Gopal Sri Ram JCA (as he then was) has decided as follows:

> *In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act — and we hasten to repeat that this is not the case here — its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available ex debito justitiae to an applicant who is able to demonstrate an error of law on the part of a public decision-taker. The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in Sangram Singh v Election Tribunal AIR 1955 SC 425 at p 429:*
>
> > *That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be.* Therefore, writ petitions should not be lightly entertained in this class of case.
>
> *In Kewal Krishnan v Minister for Local Bodies & Ors AIR [1959] J & K 17, the order of the Minister was challenged on the ground, inter alia, that the reasons contained in the order made by him contained wrong reasons for his decision. Wazir CJ, in refusing relief said (at p 19):*
>
> > *Although the reasons given in the order of the Minister may be erroneous yet if the order can be supported on other valid grounds, writ of certiorari to quash that order cannot be granted.*
>
> *Suffice to say that in the circumstances of this case, the ultimate decision being correct, no*

injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons. (Emphasis added.)

Whether High Court had correctly exercised discretion to set aside first appellant's decision

[31] We have no hesitation to decide that the learned HCJ had exercised lawfully his discretion to issue a certiorari order to quash the first appellant's decision. This is because the first appellant's procedural impropriety had caused an injustice to the respondent by adversely affecting the respondent's constitutional right to livelihood.

[32] We are not persuaded that the any one or all of the following grounds can justify a refusal by the High Court to set aside the first appellant's decision:

(1) the respondent has not objected to the admissibility of the chemist report at the summary trial;

(2) no cross-examination (seven witnesses); and

(3) the respondent could have called the chemist to testify for the respondent at the summary trial.

We do not accept the above grounds due to the following reasons:

(a) premised on the nature of the charge, the respondent could only be found guilty of the charge beyond all reasonable doubt if the first appellant had called the chemist to provide her expert opinion in the summary trial;

(b) the matters raised by the learned SFC in the above sub-paras (1) to (3) could not be tantamount to proof beyond all reasonable doubt that the respondent was guilty of the charge; and

(c) the respondent was not legally represented at the summary trial. It was therefore understandable as to why the respondent acted the way he did at the summary trial.

Whether second appellant's decision should be set aside

[33] We reproduce below reg 61 of the AFTSR:

reg 61 *Discharge from service*

(1) *The competent authority may, at any time, discharge any serviceman from the service of the regular forces on the following grounds*:

(a) in the case of a recruit, he is unlikely to become an efficient serviceman;

(b) in the case of a recruit, upon him applying to purchase his discharge pursuant to section 31 of the Act;

(c) the enlistment of the serviceman is not approved;

(d) the enlistment of the serviceman was not properly made;

(e) the particulars written in the attestation paper during the enlistment of such serviceman are false;

(f) mercy;

(g) the state of health of such serviceman is lower than the medical standards as determined under regulation 11;

(h) the lack of a suitable post or the absence of prospects for promotion or career development for the serviceman in the regular forces or the abolition of any post in the regular forces;

(i) unfitness or inefficiency of such serviceman which is not tantamount to a misconduct;

(j) misconduct committed by the serviceman and he has been convicted;

(k) the serviceman has been sentenced to a discharge or discharge with disgrace by court-martial;

(l) renunciation or loss of Malaysian citizenship;

(m) *the service of the serviceman is no longer required*;

(n) in the interest of the service;

(o) with the approval of the Armed Forces Council, upon the serviceman being appointed to serve in any organisation in which the Government or any State Government has an interest;

(p) the serviceman is found to be involved in political activities as prohibited in Perintah Majlis Angkatan Tentera;

(q) the serviceman has completed his period of full-time service in the regular forces;

(r) the serviceman has been granted a commission as an officer; or

(s) in the opinion of the competent authority, a particular circumstance requires so.

(2) Notwithstanding any provisions in these Regulations, a warrant officer who has been reduced to a lower rank may apply to be discharged from the service of the regular forces and the competent authority, after considering his application, may discharge such warrant officer pursuant to section 32 of the Act.

(3) *The discharge under this regulation shall be in accord for the purpose of determining the grant of pension, gratuity and other benefits as provided in the*

regulations made under section 187 of the Act. (Emphasis added.)

[34] We are of the following view regarding reg 61(1)(m) of the AFTSR:

(1) according to reg 61(3) of the AFTSR, a serviceman who is discharged from Service under reg 61 of the AFTSR is entitled to his or her pension, gratuity and all other benefits. Articles 5(1) and 8(1) of the FC provides as follows:

> Article 5(1) *No person shall be deprived of his* life or *personal liberty save in accordance with law*.
>
> Article 8(1) *All persons are equal before the law and entitled to the equal protection of the law*. (Emphasis added.)

The term 'law' is defined in art 160(2) of the FC to include 'written law'. By reason of s 3(b) of the Interpretation Acts 1948 and 1967, 'written law' means, among others, subsidiary legislation made under an Act of Parliament. AFTSR (made pursuant to ss 15 and 36 of the AFA) constitute subsidiary legislation and 'law' as provided in arts 5(1) and 8(1) of the FC. Accordingly, reg 61(1)(m) of the AFTSR does not breach a serviceman's constitutional right to livelihood under arts 5(1) and 8(1) of the FC because a serviceman's constitutional right to livelihood may be lawfully deprived in accordance with reg 61(1)(m) of the AFTSR (which constitutes 'law' as understood in arts 5(1) and 8(1) of the FC);

(2) a literal interpretation of reg 61(1)(m) of the AFTSR means that the competent authority has a discretion to discharge a serviceman 'at any time' from Service on the ground that the 'service of the serviceman is no longer required' ('literal interpretation');

(3) before the competent authority decides to discharge a serviceman from service pursuant to reg 61(1)(m) of the AFTSR, the literal interpretation does not require the competent authority to give the serviceman a right of hearing;

(4) once the competent authority has exercised the discretionary power under reg 61(1)(m) of the AFTSR to discharge a serviceman from Service on the ground that the serviceman's service is no longer required, the competent authority is not required by the literal interpretation to give any reason for that decision to the serviceman in question;

(5) with regard to matters concerning the administration of our Armed Forces and national security, including the discharge of a serviceman from Service, the court should defer to the exercise of the competent authority's subjective discretion pursuant to reg 61(1)(m) of the AFTSR ('purposive construction'). The purposive construction is explained by

Malin VC in UK's High Court in *In re Tufnell* (1876) 3 Ch D 164 at pp 172 and 177, as follows:

> I am sorry to be obliged to come to the conclusion that the case is entirely against Mr Tufnell. This is a petition of right claiming compensation against the Crown, not for dismissal from any office, but for removal in this sense, that instead of continuing to hold the office he has been put on half-pay ...
>
> ...
>
> *That litigation has resulted in shewing most clearly that every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay, or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from, and therefore, on general principles, I come to the conclusion that Mr Tufnell has no ground whatever to complain. He ought to bear in mind that during the last thirty-five years he has been an officer of the British army, and, as such, subject to the will and pleasure of the Crown, which will retain or remove him as it thinks fit.* (Emphasis added.)

(6) in accordance with the literal interpretation and purposive construction, the competent authority may exercise its discretion to discharge a serviceman from Service 'at any time' pursuant to reg 61(1)(m) of the AFTSR even though:

(a) the serviceman has been previously exonerated in a summary trial or court-martial ('summary trial/court-martial'); or

(b) the serviceman has been found guilty and punished in the summary trial/court-martial ('decision (summary trial/court-martial)') and the decision (summary trial/court-martial) is subsequently quashed by way of an order of certiorari by the court.

(7) if the court sets aside a decision of the competent authority to discharge a serviceman from Service under reg 61(1)(m) of the AFTSR, this will not only be contrary to the literal interpretation and purposive construction but will also render reg 61(1)(m) of the AFTSR redundant.

[35] In this case, the second appellant's decision was clearly made under reg 61(1)(m) of the AFTSR. Premised on the reasons expressed in the above para 34, notwithstanding the quashing of the first appellant's decision by the High Court (due to the first appellant's procedural impropriety), the second appellant's decision could still be lawfully made under reg 61(1)(m) of the AFTSR. In other words, once the learned HCJ had set aside the first appellant's decision, the High Court could not set aside the second appellant's decision as a matter of course.

[36] Regrettably, the learned HCJ had issued a certiorari order to quash the second appellant's decision without any consideration of the literal interpretation and purposive construction. In fact, the GOJ did not even refer to reg 61(1)(m) of the AFTSR. Such an omission, in our view, amounts to a legal error on the part of the learned HCJ which warrants appellate intervention by this court.

[37] There is a second reason to uphold the validity of the second appellant's decision. The statement did not allude to any ground to impugn the second appellant's decision. Worse still, no reference was made in the statement to reg 61(1)(m) of the AFTSR. In this regard, we reproduce below O 53 rr 3(2) and 7(1) of the RC:

> O 53 r 3(2) *An application for leave* must be made ex parte to a Judge in Chambers and *must be supported by a statement setting out* the name and description of the applicant, *the relief sought and the grounds on which it is sought*, and by affidavits verifying the facts relied on.
>
> O 53 r 7(1) *The Judge may allow the statement to be amended*, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, *and where the applicant intends to amend his statement* or use further affidavits, *he must immediately give notice of his intention and of any proposed amendment of his statement to every other party*. (Emphasis added.)

By virtue of O 53 r 3(2) of the RC, the respondent is bound by the statement (which did not state any ground to invalidate the second appellant's decision, let alone refer to reg 61(1)(m) of the AFTSR). Furthermore, the respondent did not apply to court pursuant to O 53 r 7(1) of the RC to amend the statement so as to include any ground to impugn the second appellant's decision. In this regard, we rely on the following judgment of the Court of Appeal delivered by Ahmadi Asnawi JCA in *DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor* [2019] 3 MLJ 671; [2019] 3 CLJ 593 at para [48]:

> [48] *Further, under O 53 r 3(2), an application for leave for judicial review* must be made ex parte and *must be supported by a statement setting out* the name and description of the applicant, *the relief sought and the grounds in which it is sought and by affidavits verifying the facts relied on. This order is mandatory. It further emphasises the principle that a party is bound by his own pleading and this rule is also mandatory in nature* ... (Emphasis added.)

[38] Lastly, in view of the object of reg 61(1)(m) AFTSR (please refer to the above sub-para 34(5)), the learned HCJ should have declined to exercise his discretion to issue an order of certiorari to quash the second appellant's decision.

Should respondent be court-martialled?

[39] As explained in the above para 19, the first appellant had not breached s 97(9) of the AFA by not giving the respondent a right to elect to be tried by court-martial. As such, there was no lawful basis for the learned HCJ to issue a mandamus order for the respondent to be court-martialled.

[40] In any event, due to the application of reg 61(1)(m) of the AFTSR which justified the second appellant's decision (please refer to the above paras 34–36), namely, the respondent had been lawfully discharged from Service by the second appellant's decision, an order of mandamus to direct the respondent accused to be re-tried by court-martial is an exercise in futility.

Costs

[41] The Court of Appeal has a discretion under r 54 of the Rules of the Court of Appeal 1994 to award costs for an appeal. We have decided that no costs for this appeal should be awarded because firstly, the appellants have only succeeded in part. Furthermore, this appeal raises novel questions of law (as outlined in the above para 2).

CONCLUSION

[42] Premised on the above evidence and reasons, we allow this appeal in part as follows:

(1) part of the High Court's decision (to quash the first appellant's decision by way of certiorari with no order of costs for the JRA) is affirmed;

(2) part of the High Court's decision which had issued:

(a) a certiorari order to quash the second appellant's decision;

(b) an order of mandamus for the respondent to be re-tried by court-martial is set aside; and

(3) there will be no order as to costs for this appeal.

High Court's quashing of A1's decision affirmed; but quashing of A2's decision set aside as well as the order that the respondent be re-tried by court-martial:

Reported by Ashok Kumar